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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5645

JOHNNY PAUL WITT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTIONS PRESENTED

I. Whether the decision of the Supreme Court of Florida violated the Supremacy clause of the Constitution of the United States by refusing to consider Petitioner's claim in a collateral attack on his death sentence based upon an alleged change in constitutional law emanating from the United States Court of Appeals for the Fifth Circuit in Smith v. Estelle, that the trial court violated Petitioner's Fifth and Fourteenth Amendment rights of admitting evidence of his incriminating statements to court-appointed psychiatrists in the absence of warnings that his statements could be used against him?

II. Whether the decision of the Supreme Court of Florida violated the Eighth and Fourteenth Amendments by refusing to consider Petitioner's claim to a collateral attack on his death sentence based upon an alleged change in constitutional law emanating from the Supreme Court of Florida in Elledge v. State, that the trial court subjected Petitioner to

cruel and unusual punishment and denied him due process and equal protection of the law by considering nonstatutory aggravating circumstances in support of the death sentence?

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 387 So.2d 922 (Fla. 1980).

JURISDICTION

Respondent concedes that jurisdiction is properly invoked pursuant to 28 U.S.C. § 1257(3) and the Court can exercise jurisdiction to the extent that a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions are set forth in the Petition at page 8.

STATEMENT OF THE CASE

Petitioner Johnny Paul Witt was tried for and convicted of first degree murder in 1974. Prior to trial, Petitioner had requested the appointment of court-appointed psychiatrists to determine his competence to stand trial and his sanity at the time of the offense. His motion was granted. Thereafter, during the penalty phase of the proceedings, and after the jury had determined his guilt, the psychiatrists testified, without any objection predicated upon the Fifth Amendment privilege against self-incrimination, with respect to statements made by the Petitioner. The jury recommended the imposition of a sentence of death; the trial court imposed a sentence of death and the Supreme Court of Florida unanimously affirmed. Witt v. State, 342 So.2d 497 (Fla. 1977). This Honorable Court denied Witt's petition for writ of certiorari. Witt v. Florida, 434 U.S. 935, 54 L.Ed.2d 294 (1977), rehearing denied 434 U.S. 1026, 54 L.Ed.2d 774 (1978).

In November of 1979, thirty-three months after the opinion affirming his judgment and sentence was filed, Petitioner sought post-conviction relief in the state trial court pursuant to Rule 3.850, RCrP.

The trial judge denied the motion and the Supreme Court of Florida affirmed the denial of relief. Witt v. State, 387 So.2d 922 (Fla. 1980).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The petition for writ of certiorari should be denied for a most fundamental reason, that no substantial federal or constitutional question is presented. All that was decided below was the scope of review available under state law in a post-conviction collateral challenge to a prisoner's sentence. Neither the Constitution nor any decision of this Honorable Court require the state courts to furnish a post-conviction post-appeal vehicle for permitting collateral challenges to a judgment and sentence as broad and extensive as a prisoner would desire. Nor does the Constitution or any decision of this Honorable Court require, assuming arguendo that state courts are compelled to furnish the prisoners a collateral post-appeal proceeding, the state courts to accept the reasoning of any lower federal court on a question of law. Neither the Constitution nor any decision of this Honorable Court compels the states to create a post-conviction, post-appeal procedure remedy to accommodate rulings of lower federal tribunals. The following reasoning by the Supreme Court of Florida offends nothing in the Constitution:

> [5] We start by noting that we are not obligated to construe our rule concerning post-conviction relief in the same manner as its federal counterpart, at least where fundamental federal constitutional rights are not involved. First, the concept of federalism clearly dictates that we retain the authority to determine which "changes of law" will be cognizable under this state's post-conviction relief machinery. Second, we know of no constitutional requirement that the scope of Rule 3.850 be fully congruent with that of the analogous federal statute. A limited role for the rule in no way abridges the federal due process right to be heard, since state prisoners will still be free to seek collateral relief in the federal courts under that system's seemingly more relaxed standards. In fact, several commentators have argued forcefully that state courts should narrow

> their grounds for collateral relief because of the duality of review, and at least one state has limited post-conviction relief narrowly to constitutional claims.
>
> (footnotes omitted)
>
> (Text 387 So.2d at 928)

The decision of the lower court, consistent with the United States Constitution, concluded that collateral challenges to a death sentence under state Rule 3.850 can be made on alleged changes of law only when the change emanates from the state supreme court or this Honorable Court, is constitutional in nature and constitutes a development of fundamental significance. 387 So.2d at 921.

Petitioner argues that it is important to resolve the question of the degree of recognition and respect state courts owe to decisions of lower federal courts, citing Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), cert. granted ___ U.S. ___, 63 L.Ed.2d 758 (1980). However important it may be to resolve the very broad question of state court recognition and respect for lower federal court decisions, acceptance of this petition will not advance the resolution of the question. Unlike the petitioner in Smith v. Estelle, supra, Mr. Witt never interposed any Fifth Amendment privilege against self-incrimination objection in the trial court and he thereby waived such a claim. See Roberts v. United States, ___ U.S. ___, 63 L.Ed.2d 622 (1980) wherein this Court observed:

> [5a] In this case, as in Vajtauer v. Commissioner of Immigration, 273 US 103, 113, 71 L Ed 560, 47 S Ct 302 (1927), petitioner "did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-crimination. His assertion of it here is evidently an after thought." The Court added in Vajtauer that the privilege "must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." Ibid. Thus, if petitioner believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate.
>
> (footnote omitted)
>
> (Text 63 L.Ed.2d at 630).

Moreover, and unlike the situation presented in Smith v. Estelle, supra, there was no unfair surprise to the defense by the state's calling the psychiatrists as witnesses. In the instant case:

(1) Prior to trial, defense counsel asked the court to appoint psychiatrists for an examination, in part, to support a proposed defense of insanity.

(2) Petitioner's motion was granted and after Witt was examined by Doctors Gonzalez and Sprehe, the trial court ruled that Witt was competent to stand trial.

(3) Thereafter, petitioner, through his counsel, expressed the desire to pursue an insanity defense utilizing the names of both these doctors on his Notices of Intent to Rely on Defense of Insanity.

(4) Thus, unlike Smith v. Estelle, there was no secret interrogation unknown to defense counsel nor was there any surprise to the petitioner when the two psychiatrists testified at the sentencing phase of the trial.

Petitioner's failure to raise his Fifth Amendment issue at the appropriate stage during the trial constitutes an independent state ground warranting denial of relief on a challenge years later. See Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977).

The petitioner's second submitted question similarly fails to raise a substantial federal or constitutional issue. Petitioner contends that it violates the Constitution and principles established in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976) for the trial judge to impose a sentence of death if he considers non-statutory aggravating factors when a mitigating factor is also present. Respondent notes

that in Proffitt the trial judge also found a non-statutory aggravating factor and footnotes 8 and 14 of that opinion only suggest that it is unlikely a Florida death sentence would be approved if based entirely on non-statutory aggravating circumstances. Witt's sentence, imposed in 1974, does not rest entirely on non-statutory aggravating factors. A death sentence may properly stand when the reviewing court can determine that the mitigating factor is so minimal that elimination of the non-statutory aggravating factor would have made no difference in the sentence imposed. Brown v. State, 381 So.2d 690 (Fla. 1980);[1] see also State of Arizona v. Steelman, 612 P.2d 475 (Ariz. 1980), cert. den. ___ U.S. ___, 28 Cr.L. 4037.

Finally, petitioner Witt worries that unless this Court accepts this certiorari petition an unreasonable burden will be placed upon federal courts called upon to decide constitutional issues. But there will always be a burden upon federal courts when, from petitioner's perspective, the state courts fail to agree with the petitioner's contentions. And the fact of the matter is that petitioner has already added to the asserted burden, he filed a petition for writ of habeas corpus in the Middle District of Florida on May 5, 1980, and it has been pending there for some six months now.

The instant petition raises no substantial federal or constitutional question; rather, the decision of the lower court turns entirely on state law matters. Accordingly, the petition should be denied.

Respectfully submitted,

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1/ To the extent petitioner suggests that Elledge v. State, 346 S.2d 998 (Fla. 1977) must be applied retroactively to him, the Florida courts are not required to so construe the statute. See Wainwright v. Stone, 414 U.S. 21, 38 L.Ed.2d 179 (1973).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing has been furnished, by U.S. Mail, to Paul C. Helm, Esquire, Assistant Public Defender, Hall of Justice Annex, 495 N. Carpenter Street, Bartow, Florida 33830, on this 20th day of November, 1980.

Robert J. Landry

Of Counsel for Respondent